



CSU  
College of Law Library

Cleveland State Law Review

---

Volume 12  
Issue 2 *Trauma: Causation Problems (A  
Symposium)*

---

Article

1963

## In Contemplation of Death

Hendrick Machoian

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Taxation-Federal Estate and Gift Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

### Recommended Citation

Hendrick Machoian, *In Contemplation of Death*, 12 *Clev.-Marshall L. Rev.* 381 (1963)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in *Cleveland State Law Review* by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

## In Contemplation of Death

### Hendrick Machoian\*

THE PHRASE "IN CONTEMPLATION OF DEATH" is used in connection with gifts in federal estate tax law<sup>1</sup> and in connection with gifts *causa mortis* at common law.<sup>2</sup> The purpose of this paper is to determine the difference, if any, between the scope of the phrase for federal estate tax purposes and the scope of the phrase for purposes of gifts *causa mortis*.

The gift *causa mortis* "goes back to a very early period. It was brought to England as part of the Roman or civil law, and seems to have been recognized by the Greeks before it was known to the Romans. This country adopted it as part of the common law of England."<sup>3</sup>

A gift *causa mortis* means a gift in contemplation of the donor's death,<sup>4</sup> and may be defined as a gift of personal property made in the prospect of the donor's death and upon condition that the property shall belong completely to the donee in the event that the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked.<sup>5</sup>

From the above definition, it is clear that a vital and necessary element of a gift *causa mortis* is that the transfer be made in contemplation of death. But does the phrase in such context have reference to the general expectation or apprehension of death which all persons entertain or does it have reference to some other concern? It is well settled at common law that the contemplation of death necessary to constitute a gift *causa mortis* must arise from an expectation of imminent death from disease or peril impending at the time of the gift.<sup>6</sup> In other words, a gift *causa mortis* is one made in the concerned approach of death, not general apprehension of death, but an apprehension arising from a peculiar sickness, peril or danger—that is, in anticipation of impending death.

---

\* Student, Washington College of Law, American University.

<sup>1</sup> Sec. 2035, 1954 I. R. C.

<sup>2</sup> *Streeper v. Myers*, 132 Ohio St. 322, 7 N. E. 2d 554 (1937); *Levas v. Dewey*, 33 Wash. 2d 232, 205 P. 2d 356 (1949).

<sup>3</sup> *Trout v. Farmers' Trust Co. of Newark*, 19 Del. Ch. 437, 168 A. 208, 210 (1933).

<sup>4</sup> *Adcock v. Bishop*, 309 Ky. 502, 218 S. W. 2d 52, 53 (1949).

<sup>5</sup> *Foster v. Reiss*, 31 N. J. Super. 496, 107 A. 2d 24, 26 (1954).

<sup>6</sup> See 24 Am. Jur., Gifts, Sec. 6, n. 12, for cases so holding.

The phrase "in contemplation of death" now used in statutes was no doubt borrowed from the common law gift *causa mortis*. The phrase first appeared in the New York Inheritance Tax Law of 1891,<sup>7</sup> and was early held to apply to gifts *causa mortis*.<sup>8</sup> The phrase soon found its way into the inheritance tax statutes of other states; and by the time the first federal estate tax law was enacted, state courts (including New York) were generally holding that the phrase was not restricted to gifts *causa mortis*.<sup>9</sup>

The phrase was first used by the Congress in the Revenue Act of 1916, imposing an estate tax.<sup>10</sup> The phrase was continued in every subsequent Revenue Act, and later in Sections 811 (c) (1) (A) and 811 (1) of the Internal Revenue Code of 1939 and then in Section 2035 of the 1954 Code. The phrase is used to create a statutory presumption of includibility of gifts in the gross estate of a decedent, unless shown to the contrary, where such gifts are made within three years before his death, except to the extent that the transfer was made for a full and adequate consideration in money or money's worth.<sup>11</sup>

<sup>7</sup> New York Laws, 1891, c. 215, Sec. 1 (Mertens' Law of Federal Gift and Estate Taxation, Vol. 3, Sec. 22.01, n. 1, states, without a supporting reference, that the phrase first appeared on the American scene in a Maryland statute of 1844.)

<sup>8</sup> Matter of Seaman, 147 N. Y. 69, 41 N. E. 401 (1895).

<sup>9</sup> Annotations, 18 L. R. A. (N. S.) 458 (1909), 46 *Ibid.* 790 (1913), 7 A. L. R. 1028, 1030 (1920).

<sup>10</sup> Sec. 202 (b), Revenue Act of 1916. *Infra*, 283 U. S. at 114, note 12.

<sup>11</sup> Since the inception of the federal estate tax in 1916, property transferred by a decedent in contemplation of death has been includible in his gross estate. The 1916 act subdivided transfers in contemplation of death into two classifications: (1) transfers made at *anytime* could be in contemplation of death, and (2) transfers of a material part of the transferor's property within two years of his death were *presumed* to have been made in contemplation of death.

In 1926 Congress made the two-year presumption conclusive (Section 302 (c), Revenue Act of 1926), but in *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358 (1932), the Supreme Court of the United States ruled that the provision as written was unconstitutional, being violative of the due process clause of the Fifth Amendment to the Constitution of the United States. Throughout the period 1916-50, transfers made outside the presumptive period could be included in the gross estate if, without recourse to the presumption, they were made in contemplation of death. In 1950, however, the final clause of what is now Section 2035 (b) was enacted, providing that gifts made more than three years before death may not be included in the gross estate as gifts in contemplation of death. At the same time the language of the rebuttable presumption was given in its present form, and the period to which it applies was extended from two to three years (Sec. 502, Revenue Act of 1950). These amendments are incorporated into the 1954 Code, which provides at the present time as follows:

(Continued on next page)

The question of whether the scope of the phrase "in contemplation of death" for federal estate tax purposes was restricted to its scope in gifts *causa mortis* was decided in 1931 by the Supreme Court of the United States in the case of *United States v. Wells*,<sup>12</sup> which involved a gift under the Revenue Act of 1918. In that case the Government was contesting a decision of the Court of Claims which had held that "'contemplation of death' does not mean that general knowledge of all men that they must die, but there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer."<sup>13</sup>

It is apparent that the Court of Claims was restricting the meaning of the phrase "in contemplation of death" to its definition in gifts *causa mortis*. The Government argued that such definition was too narrow; that transfers in contemplation of death are not limited to those induced by a condition causing expectation of death in the near future; that the character of such gifts is determined by the state of mind of the donor at the time they are made, and that the statutory presumption may be overcome only by proof that the decedent's purpose in making the gift was to attain some object desirable to him during his life, as distinguished from the distribution of his estate as at death. Although the Court affirmed the decision of the Court of Claims on other grounds, it agreed that "the Government [was] right in its criticism of the narrowness of the rule laid down by the Court

(Continued from preceding page)

Section 2035. Transaction in Contemplation of Death.

(a) General Rule.—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) Application of General Rule.—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property . . . such transfer . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . . ; but no such transfer, . . . made before such 3-year period shall be treated as having been made in contemplation of death.

<sup>12</sup> 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867 (1931).

<sup>13</sup> 69 Ct. Cl. 485, 39 F. 2d 998 1009 (1930).

of Claims, in requiring that there be a condition 'creating a reasonable fear that death is *near at hand*,' and that '*such* reasonable fear or apprehension' must be 'the only cause of the transfer.'" <sup>14</sup>

The Court also said:

The words 'in contemplation of death' mean that the thought of death is the *impelling cause* of the transfer, and while the belief in the imminence of death may afford the convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.'

If it is the thought of death, as a *controlling motive* prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive.<sup>15</sup> [Italics supplied.]

The Court was speaking of motives associated with death. But after describing several possible living motives, the Court went on to say, ". . . the gratification of such desires [living motives] may be a more *compelling motive* than any thought of death." And further, the Court said, ". . . There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the *dominant motive* of the donor in the light of his bodily and mental condition. . ." Still further, the Court said, ". . . It is sufficient if contemplation of death be the *inducing cause* of the transfer whether or not death is believed to be near. . ." <sup>16</sup> (Italics supplied.)

As can be seen, the Supreme Court did not adhere to one definition. It directed a finding to:

1. the impelling cause,
2. the controlling motive,
3. the compelling motive,
4. the dominant motive,
5. the inducing cause.

In most transfer cases, more than one motive contributed to the decedent's decision to make the transfer. That is, the decedent could have had mixed motives—motives associated with life, and motives associated with death. How are the various

---

<sup>14</sup> 283 U. S. at 119.

<sup>15</sup> *Id.* at 118.

<sup>16</sup> *Id.* at 118, 119.

motives weighed? The present regulations define a transfer in contemplation of death as one "prompted by the thought of death."<sup>17</sup> The regulations point out that it need not be solely so prompted;<sup>18</sup> but "a transfer is prompted by the thought of death if (1) made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death."<sup>19</sup>

Thus, the present regulation definition of "in contemplation of death" means that if the transfer would not have been made solely by reason of a living motive the additional death motive must have prompted the transfer. In other words, the position taken in the regulations is that decedent's motives must be shown to have been associated with life and that there will be no weighing of motives.

This test appears to be much stricter than the test set out by the Supreme Court in the *Wells* case, *supra*, which appears to have established the "dominant motive" test where mixed motives are involved in a transfer.<sup>20</sup> These different definitions no doubt account for the fact that so many contemplation-of-death cases go to court, and for the further fact that the Government wins only 34 percent of these cases.<sup>21</sup>

In spite of the difference between the definition laid down by the Supreme Court and that set out by the regulations, it is quite clear that the phrase "in contemplation of death" in Section 2035 does not refer to the general expectation of death which all men entertain, nor is its meaning confined to such an expectancy of death as is required in a gift *causa mortis*. The differentiating factor between the scope of the phrase in gifts *causa*

<sup>17</sup> 26 C. F. R. Sec. 20.2035-1 (c) (1954).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> After the Supreme Court decision in the *Wells* case, (*supra*, note 12) the regulations adopted the test that "if the transfer results from mixed motives, one of which is the thought of death, the more compelling motive controls." (Art. 16 of Regulations 80) This test appeared to adopt the "dominant motive" test. Viewing the Treasury interpretation of the *Wells* case, the courts decided many cases against the Government by finding a dominant living motive, e.g. *Farmers' Loan & Trust Co. v. Bowers*, 98 F. 2d 794 (2d Cir. 1938), cert. den. 306 U. S. 648. That case was followed (in 1940) by an amendment to the regulations eliminating the language that the compelling motive controls where there are mixed motives. The definition of a gift in contemplation of death was given its present form by that amendment.

<sup>21</sup> *Atlas, Gifts in Contemplation of Death*, 23 *Taxes* 421 (1945).

*mortis* and in transfers under Section 2035 must be found in the transferor's motive when he made the particular transfer. The question of motive is essentially one of fact and is difficult to ascertain, especially where the subject is dead. For these reasons, the courts have not been effective in delimiting the precise scope of the phrase for purposes of Section 2035. Each case must be examined and decided in the light of all the surrounding circumstances. But it may be generally said that the phrase "in contemplation of death" in Section 2035 is satisfied where for *any reason* the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some way affect its devolution.

In conclusion, it may be said that the scope of the phrase "in contemplation of death" for purposes of gifts *causa mortis* has reference to an expectation of imminent death from disease or peril impending at the time of the gift, and not to the general apprehension of death which all men entertain. On the other hand, the scope of the phrase for federal estate tax purposes is not restricted to its meaning in gifts *causa mortis*, nor does it have reference to the general apprehension of death which all men entertain. The precise scope of the phrase, though broader than in gifts *causa mortis*, is to be found in each case by looking into the state of mind of the decedent and finding his motive when he made a particular transfer of property.